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No. 92-533

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NICOLE ADAMS, a Minor Child, By and Through Her Next Friend, BETTY RIDGELL, and BETTY RIDGELL, as Representative of the Estate of JULIA ALICE ADAMS,

Petitioners,

v.

THE CHILDREN'S MERCY HOSPITAL, SUZANNA ROUSHAR, R.N., CYNTHIA DOOLEY, R.N., and JANE JELINEK-BOOZALIS, M.D.,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

INTRODUCTION AND SUMMARY

The main focus of both of respondents' briefs in opposition is the federal jurisdictional issue rather than the substantive considerations governing review on a writ of certiorari. The record below firmly establishes that the federal constitutional issues presented here were clearly and plainly preserved.

The remainder of each respondent's brief serves only to bolster Petitioners' claim that there exists a direct and substantial conflict in the lower courts on the questions presented in the Petition. Having fully percolated in the courts below, it is appropriate and timely for this Court to resolve this important conflict.

ARGUMENT

I. PETITIONERS CLEARLY PRESERVED THE FEDERAL CONSTITUTIONAL ISSUES AT BOTH STAGES OF THE PROCEEDINGS BELOW SO AS TO SQUARELY ACCORD THIS COURT WITH JURISDICTION OVER THE TWO (2) FEDERAL QUESTIONS PRESENTED [1]

Petitioners' federal claims clearly were "pressed or passed upon" below in the Missouri state courts so as to accord jurisdiction in this Court.[2] The extensive appendices to this reply brief are intended solely for this Court's convenience to dispel any doubt that jurisdiction is proper in this Court. This Court's decision on certiorari in this case should be devoid of any jurisdictional concern.

A. Respondents' argument that the federal *quid pro quo* due process claim was not properly preserved in the Supreme Court of Missouri is frivolous. Not only did Petitioners raise this due process claim and cite to the *Duke Power* and *New York Central Railroad* cases in their brief to the Missouri Supreme Court, but also they discussed the federal *quid pro quo* analysis at great length.[3]

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[1] The intermediate State appellate court, the Missouri Court of Appeals, was not involved on the merits of the constitutional issues because Petitioners took a direct appeal from the trial court to the Supreme Court of Missouri.

[2] *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 (1988); *Clark v. Jeter*, 486 U.S. 456, 459-60 (1990). This Court has made it clear that this rule "operates in the disjunctive," *United States v. Williams*, 112 S.Ct. 1735, 1738-39 (1992), such that Petitioners may satisfy this jurisdictional rule either by having "pressed" these claims below or by the State court's "passing upon" them.

[3] Petitioners' *quid pro quo* argument to the Supreme Court of Missouri included the following:

> Due Process analysis has involved the judicial requirement of a *quid pro quo* or "reasonably just substitute." *Duke Power*

The Supreme Court of Missouri did explicitly address and reject Petitioners' federal equal protection challenge. *Adams*, 832 S.W.2d at 903, 905. The federal equal protection claim was raised in precisely the same manner as Petitioners' due process claim. Petitioners' federal and state constitutional claims were merged throughout the case such that the Supreme Court of Missouri's rejection of the state due process claim clearly rebuked the cognate federal claim as well.

Nevertheless, in an abundance of caution so as to secure as clear a record as possible for this Court, Petitioners filed a Motion for Rehearing with the Supreme Court of Missouri wherein they requested that that court explicitly address the federal due process argument raised by Petitioners in their brief (Appellants' Motion for Rehearing, App. B, at 38a-39a). In response to that Motion for Rehearing, respondent hospital directly conceded the jurisdictional issue:

> This Court's May 19, 1992, decision answers the federal constitutional issues raised by the appellants.

(Respondent Children's Mercy Hospital's Suggestions in Opposition to Appellants' Motion for Rehearing, App. C, at 44a-45a). Respondent hospital clearly admitted the federal jurisdictional issue which it now seeks to dispute:

> The appellants' argument fails for several reasons: First, the rationale this Court used in finding that

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> *Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). . . . In upholding the Act under Equal Protection and Due Process grounds, the [U.S. Supreme] Court emphasized the significance of a substitute compensation scheme. *Id.* at 92-93.
>
> . . .
>
> Exactly the same reasoning applies to the case at bar in that Appellant has been deprived of a number of rights without any substitute remedy whatsoever.

(Petitioners' Brief to Supreme Court of Missouri, App. A, at 31a-33a). Petitioners also cited *New York Central R. Co. v. White*, 243 U.S. 188 (1917), as the "genesis of *quid pro quo* constitutional analysis [by] the U.S. Supreme Court." (App. A, at 31a n.31).

> Chapter 538 does not violate the trial by jury or due process provisions of the Missouri Constitution is the same analysis that applies to the United States Constitution. Therefore, the decision necessarily means that the federal Constitution has not been violated.

(App. C, at 44a-45a). Respondent hospital's current contention that "the Missouri Supreme Court did not have an opportunity to pass on this specific issue [federal due process *quid pro quo*]" (p. 3) is disingenuous and wholly inconsistent with the full record of proceedings below.[4] By upholding the statute, that court necessarily rejected the federal due process claim.

B. Respondent hospital contends that Petitioners failed to preserve the federal constitutional issues in the trial court urging that the challenge was untimely and not specific enough. These contentions are simply unsupportable based on the record.[5]

Initially, as to the timeliness of the constitutional challenge, respondent hospital raised this same point before the Supreme Court of Missouri. The Supreme Court of Missouri found that certain challenges raised *subsequent* to the entry of judgment were not preserved, but none of these involved the federal due process or equal protection challenges to the statutory "cap," both of which were raised and preserved pursuant to Missouri law in Petitioners' motion filed prior to trial. *Adams*, 832 S.W.2d at 907-08. If Petitioners' federal due process or equal

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[4] Respondent Jelinek's assertion that Petitioners failed to preserve their "arbitrary and capricious" arguments likewise should not be taken seriously. The arbitrary nature of the statute was argued repeatedly throughout Petitioners' brief to the Supreme Court of Missouri.

[5] Prior to trial, Petitioners filed a motion with the trial court challenging the Missouri statute on both federal and state constitutional grounds (Resp. Hosp.'s Brf. in Opp., App. A).

protection challenges had been untimely raised in the trial court, the Supreme Court of Missouri would have so held.[6]

As to the specificity of Petitioners' federal claims at the trial court level, it is clear that the statutory "capping" provision, as were all provisions of the Act, was being challenged under both Equal Protection and Due Process under the Fourteenth Amendment to the United States Constitution.[7] In unequivocal language, Petitioners stated:

> *Chapter 538 and its specific provisions denies Plaintiffs equal protection and due process of law under the United States Constitution*— . . . The Fourteenth Amendment to the United States Constitution

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[6] As set forth by this Court in *Bankers Life, supra*, the timeliness and manner in which the federal claim is first presented in the state courts may very well be an issue controlled by state, rather than federal, law. 486 U.S. at 78 (citing *Webb v. Webb*, 451 U.S. 493, 501 [1981]); *Street v. New York*, 394 U.S. 576, 583-84 (1969). In this regard, this Court stated:

> To the extent that the matter is governed by New York law, we have found no New York statutes or decisions which require that an issue be raised in the trial court with greater specificity than occurred here.

394 U.S. at 583. Petitioners' federal questions as raised at the trial court level clearly were timely preserved for decision by the Supreme Court of Missouri.

[7] In that Motion, Petitioners stated:

> 2. Chapter 538 is Unconstitutional Under the Missouri and United States Constitutions as Denying Plaintiffs Herein Equal Protection Under the Laws, Due Process of Law, . . . all as set forth in the attached Suggestions in support expressly incorporated herein by reference.

(Resp. Hosp.'s Brief in Opp., App. A, at 2a). The United States Constitution was invoked at the outset:

> It is the duty and responsibility of this [trial] Court to strike down and to block the application of any legislative act or statute which is in conflict with the provisions of the Federal or United States Constitution.

(*Id.* at 7a.)

> guarantees equal protection under the law and due process of law. The specific provisions set forth above violate the United States Constitution in every respect and in the same fashion as the Missouri Constitution.

(*Id.* at 20a) (emphasis in original). This last sentence cited above unambiguously confirms that throughout this pre-trial brief both state and federal constitutional analysis were merged.[8]

The nature of Petitioners' federal claims was sufficiently presented at the trial court level. This Court has determined that it had federal jurisdiction where a federal claim was submitted to the trial court in far less specific terms than utilized by Petitioners herein.[9]

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[8] In specific reference to the only statutory provision challenged herein, *i.e.*, the statutory "cap" on noneconomic damages, Petitioners plainly stated that this provision is directly in violation "of the United States Constitution guaranteeing right to trial by jury, equal protection and due process." *Id.* at 12a.

[9] In *Street v. New York*, 294 U.S. at 582-83, respondent claimed that the petitioner failed to preserve the federal claim at the trial level. This Court found that the manner of counsel's raising the federal constitutional issue in the form of a short oral motion was sufficient where the federal constitutional claim was clearly referenced and the issue was fully briefed in the appellate courts. *Id.* at 584-85. On the issue of "sufficient presentation," this Court relied upon *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928):

> There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.

394 U.S. at 584 (footnote omitted). *See also Taylor v. Illinois*, 484 U.S. 400, 406-07 n.9 (1988); *Arkansas Electric Cooperative Corp.*

On the basis of the record below, it is abundantly clear that the federal questions presented here were timely and appropriately raised below.[10] Petitioners' pleadings were unambiguous on this score such that it was clear to respondents that the state and federal constitutional claims were merged.[11] These issues were sufficiently pre-

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v. Arkansas Public Service Comm., 461 U.S. 375, 382-83 n.6 (1983); *Beck v. Alabama*, 447 U.S. 625, 631 n.6 (1980).

As stated by this Court in *Webb, supra*, while great specificity would be desirable, "we have not insisted on such inflexible specificity." 451 U.S. at 501. In that regard, this Court has stated that "[o]ur jurisdiction does not depend on citation to book and verse." *Eddings v. Oklahoma*, 455 U.S. 104, 114 n.9 (1982).

This Court has not even required that the precise terms of the federal question sought to be reviewed by this Court were raised in the state court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 78 n.2 ("the federal question must be brought to the attention of the court below in some manner"). Under the "mere enlargement" doctrine, "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed." 486 U.S. at 78 n.2 (citing to *Dewey v. Des Moines*, 173 U.S. 193, 198 [1899] and *Stanley v. Illinois*, 405 U.S. 645, 658 n.10 [1972]). This Court has shown a great measure of flexibility in this regard:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.

Yee v. City of Escondido, California, 112 S.Ct. 1522, 1532 (1992).

[10] Respondent hospital's disagreements to the manner in which judgment was entered are nugatory. The judgment as entered by the trial court clearly sets forth the effect of the statutory "capping" provision upon Petitioners' jury verdict. (App. C to Pet. for Writ of Cert., at 23a-25a). The defendant nurses are original parties to the appeal and have not been dismissed.

[11] Both of respondents' briefs filed with the Missouri Supreme Court contained extensive reference to this Court's decisions in the due process and equal protection areas, even citing to *Duke Power* (Excerpt from respondent Children's Mercy Hospital's brief, App. D, at 49a-51a; Excerpt from Resp. Jelinek's Brief to Missouri Supreme Court, App. E, at 54a). Respondent hospital understood from the beginning that Petitioners were raising federal constitu-

sented to the trial court and to the Supreme Court of Missouri and rejected so as to accord this Court with federal jurisdiction pursuant to 28 U.S.C. § 1257(a).

II. RESPONDENTS VIRTUALLY CONCEDE THAT THERE HAS DEVELOPED A CLEAR AND SUBSTANTIAL SPLIT OF AUTHORITY AMONG THE STATE COURTS AND BETWEEN THE STATE AND FEDERAL COURTS ON THE QUESTIONS PRESENTED AND THAT THIS ISSUE IS ONE OF RECURRING NATIONAL SIGNIFICANCE

Given the number of state appellate courts addressing the federal constitutionality of malpractice "caps," the decisions of four (4) U.S. Circuit Courts of Appeals upholding such statutes are not conclusive as to the lack of a solid split of authority. In none of those U.S. Circuit Court cases was review sought in this Court and the conflict persists unresolved among the numerous state appellate courts.[12]

This Court functions not only as an overseer of the federal courts but also as an arbiter to resolve substantial conflicts among the highest courts of the States with reference to federal constitutional questions. Sup. Ct. R.

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tional claims by the pre-trial motion (Suggestions of Defendants Children's Mercy Hospital, et al., in Opposition to Plaintiffs' Motion to Bar Enforcement of Chapter 538, App. F, at 56a-57a).

[12] Respondent hospital merely asserts without supporting argument or authority that the state appellate court cases cited by Petitioners are inapplicable. (Brf. In Opp., at 26-27). Respondents take specific issue with Petitioners' citation of *Arneson v. Olsen*, 270 N.W.2d 125 (N.D. 1978) (Brf. In Opp. at 26 n.40). Petitioners are not alone in relying upon this decision in that Justice White expressly cited this case as having "invalidated the challenged provision on federal constitutional grounds." *Fein v. Permanente Medical Group*, 474 U.S. at 893. Respondents' strained efforts to distinguish *Pfost v. Montana*, 713 P.2d 495 (Mont. 1985) are unavailing. Neither respondent even attempts to distinguish any of the other fourteen (14) decisions invalidating statutory "caps" cited by Petitioners. (Pet. for Writ of Cert., at 6 n.4 and 9 n.6).

10.1(b) (as amended, 1990). In that the overwhelming number of medical malpractice suits are brought in the state courts, this conflict among the state courts is highly relevant and significant. State courts and state court litigants are equally in need and deserving of clear guidance from this Court on federal constitutional matters as their federal counterparts.

Respondent hospital's primary substantive argument is ill-conceived. That this Court has denied certiorari on prior occasions is of absolutely no precedential value as to the worthiness of review in this particular case. The lower courts continue to be in confusion and disarray on this issue and require urgent and clear guidance from this Court. As set forth by Amicus Association of Trial Lawyers of America:

> The importance of the questions presented in the Petition can scarcely be overstated. Their impact reaches far beyond the parties, beyond those affected by the Missouri statute, and even beyond the nationwide controversy concerning "tort reform."

(Brf. of Amicus Curiae, at 2-3).

Respondent Jelinek's assertion that "there has been no significant change" since *Fein* (p. 12) is groundless. To the contrary, the then-existing split which prompted Justice White to author his dissent from the dismissal has greatly intensified. The continued enactment of statutory damages "caps" among the States and the divided treatment of these statutes by the State appellate courts only reinforce Justice White's conclusion that "[t]he issue is important, and is deserving of this Court's review." 474 U.S. at 895.

CONCLUSION

A review of the record in both the trial court and the Missouri Supreme Court amply demonstrates that the two (2) federal questions presented here were well preserved for purposes of this Court's jurisdiction. Respondents have made no credible challenge to any of the legal or factual underpinnings which warrant discretionary review in this Court. The substantial split of authority attests to the extensive percolation of these issues and their ripeness for resolution in this Court.

Petitioners respectfully urge this Court to grant their Petition for Writ of Certiorari.

Respectfully submitted,

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